

**DONALD W. COOK**, CSB 116666  
ATTORNEY AT LAW  
3435 Wilshire Blvd., Suite 2910  
Los Angeles, CA 90010  
(213) 252-9444; (213) 252-0091 facsimile  
E-mail: manncooklaw@gmail.com

Attorney for Plaintiff

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA**

CONNIE A. CARDINALE, an  
individual,

Plaintiff,

vs.

XAVIER BECERRA, an individual sued  
in his official capacity only; SCOTT R.  
JONES, an individual sued in his official  
and individual capacities; COUNTY OF  
SACRAMENTO, a governmental entity;  
SACRAMENTO COUNTY SHERIFF'S  
DEPARTMENT, a public entity;  
CLINTON ROBINSON (#305), an  
individual sued in his official and  
individual capacities; and Does 1 through  
20, all sued in their individual capacities,

Defendants.

Case No. 2:20-cv-1325-MCE-  
CKD

**PLAINTIFF'S NOTICE OF  
MOTION AND MOTION TO  
STRIKE DEFENDANTS'  
EXHIBIT D TO ECF 50-2;  
MEMORANDUM OF POINTS  
AND AUTHORITIES;  
DECLARATION OF  
DONALD W. COOK**

Date: Thursday, 8/10/23  
Time: 10:00 a.m.  
Ctrm: 7

TO THE HON. MORRISON C. ENGLAND, JR., SENIOR UNITED STATES  
DISTRICT JUDGE, DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on Thursday, August 10, 2023, at 10:00 a.m., or  
as soon thereafter as the parties may be heard in Courtroom 7 of the Robert T. Matsui  
United States Courthouse, located at 501 I Street, Sacramento, California, Plaintiff will  
move the Court for an order as follows:

This motion will be pursuant to Rule 37(c)(1), Federal Rules of Civil Procedure, and based upon this Notice, the accompanying Memorandum of Points and Authorities and Declaration of Donald W. Cook, and upon such other and further evidence and argument as the Court deems necessary or convenient.

**DONALD W. COOK**  
Attorney for Plaintiff

Donald W Cook

Donald W. Cook

## I. Overview and Relief Requested.

Under 42 U.S.C. § 1983, Plaintiff Connie Cardinale sues the County of Sacramento (“County”), the Sacramento County Sheriff’s Department (“SCSD”), Sacramento County Sheriff Scott R. Jones (“Jones”), and Sacramento County Deputy Clinton Robinson (“Robinson”). Plaintiff contends defendants prepared and executed an overbroad search warrant, and wrongfully seized and withheld from Plaintiff her lawfully acquired firearms.

Presently pending is Plaintiff’s motion for partial summary judgment (ECF 45). In opposition to that motion, defendants have filed a purported 17 page SCSD Computer-Aided Dispatch (“CAD”) report concerning the December 26, 2019 events at issue on Plaintiff’s Rule 56 motion. *See* ECF 50-2 filed 6/30/23 @ pp. 52-68 (Defendants’ Exhibit D). Besides being subject to serious authentication and hearsay objections,<sup>1</sup> defendants’ Exhibit D was submitted in violation of F.R.Cv.P. 37(c)(1). Thus, under Rule 37(c) and apart from Plaintiff’s admissibility objections, the Court should strike defendants’ Exhibit D from the record on the pending Rule 56 motion and preclude defendants from relying on it.

## II. Defendants Wrongfully Withheld Production Of Exhibit D During Discovery.

Defendants admit they did not produce their Exhibit D until June 30, 2023, when defendants filed their summary judgment opposition papers. Cook decl. ¶4 & Exhibits A and B thereto.

Defendants’ belated disclosure of Exhibit D after the May 17, 2023 discovery cut-off,<sup>2</sup> violated their discovery disclosure obligations. *See* F.R.Cv.P. 26(a)(1)(A)(ii) (“[A]

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<sup>1</sup> See the separately-filed “Plaintiff’s Objections to Defendants’ Evidence Submitted in Opposition to Plaintiff’s Motion for Partial Summary Judgment,” filed July 10, 2023.

<sup>2</sup> The last answer was filed May 17, 2022. ECF 44 filed 5/17/22 (Answer by Sacramento County defendants). The discovery cut-off was thus 365 days after that date, or May 17, 2023. *See* ECF 4 7/2/20 Order @ 2:18-20.

1 party must, without awaiting a discovery request, provide to other parties . . . a copy—or  
 2 a description by category and location—of all documents, electronically stored  
 3 information, and tangible things that the disclosing party has in its possession, custody,  
 4 or control and may use to support its claims or defenses, unless the use would be solely  
 5 for impeachment.”); Cook decl. ¶¶3, 5 (Defendants should have produced Exhibit D  
 6 nearly two years ago in response to Plaintiffs’ Rule 34 production requests.).

### 7 **III. The Court Should Preclude Defendants From Relying On Exhibit D.**

8 For a party who violates his discovery disclosure obligations, the Court is  
 9 empowered to impose an appropriate sanction on that party. In relevant part, F.R.Cv.P.  
 10 37(c) states:

11 (c) *Failure to Disclose, to Supplement an Earlier Response, or to Admit.*

12 (1) Failure to Disclose or Supplement. If a party fails to provide  
 13 information or identify a witness as required by Rule 26(a) or (e), the party  
 14 is not allowed to use that information or witness to supply evidence on a  
 15 motion, at a hearing, or at a trial, unless the failure was substantially  
 16 justified or is harmless. In addition to or instead of this sanction, the court,  
 17 on motion and after giving an opportunity to be heard:

18 . . . .

19 (C) may impose other appropriate sanctions, including any of the  
 20 orders listed in Rule 37(b)(2)(A)(i)—(vi).

21 To avoid sanctions, it is defendants’ burden to show that their Rule 37(c) violation  
 22 was harmless. *Yeti by Molly, Ltd. V. Deckers Outdoor Corp.*, 259 F.3d 1101, 1107 (9th  
 23 Cir. 2001). Furthermore, imposition of sanctions under Rule 37(c) does not require a  
 24 showing of bad faith. *Hyde Drath v. Baker*, 24 F.3d 1162, 1171 (9<sup>th</sup> Cir. 1994).

25 Defendants cannot carry their burden. First, defendants’ only “explanation” for  
 26 their non-disclosure discovery violation is their counsel’s one sentence statement that  
 27 Exhibit D was “unintentionally omitted.” (See **Exhibit B** hereto.) There is no explanation  
 28 how this could have occurred. There is no declaration from anyone explaining how the

1 non-disclosure was “untentional[.]”

2 Second, by producing Exhibit D years late and *after* the discovery cut-off (and even  
3 then only because Plaintiff’s counsel had brought defendants’ non-disclosure violation  
4 to defense counsel’s attention) defendants have deprived Plaintiff of any opportunity to  
5 conduct discovery based on Exhibit D. For example, Plaintiff was unable to use Exhibit  
6 D in the deposition questioning of defendant Det. Robinson. Cook decl. ¶5. This was  
7 particularly harmful. Exhibit D has many narrative entries by anonymous persons.  
8 Meanwhile, defendants admit that Det. Robinson relied on CAD entries in preparing his  
9 search warrant application. *See* ECF 50-1 filed 6/30/23 @ page 4 (In response to  
10 Plaintiff’s undisputed fact no. 10, defendants admit Robinson relied on CAD entries.).  
11 Defendants also deprived Plaintiff of the opportunity to ascertain the identities of persons  
12 responsible for the narrative entries on Exhibit D and the narratives’ reliability.

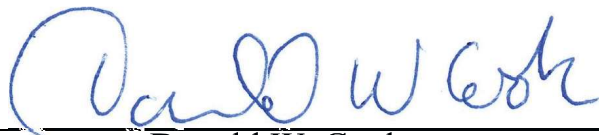
13 **IV. Conclusion.**

14 For the foregoing reasons the Court should issue an order striking defendants’  
15 Exhibit D from the record on the summary judgment motion, and preclude defendants  
16 from relying on Exhibit D.

17 DATED: July 6, 2023

18 **DONALD W. COOK**  
Attorney for Plaintiff

19  
20  
21 By



Donald W. Cook

**DECLARATION OF DONALD W. COOK**

I, DONALD W. COOK, declare:

1. I am counsel for Ms. Cardinale.

2. Upon reviewing defendants' ECF 50-2 (defense counsel's declaration) I saw that defendants had submitted as their Exhibit D a 17 page "CAD View Events Details" document. Unlike the other CAD report (see Exhibit A to ECF 45-2 filed 6/2/23 @ pp. 5-22) defendants' Exhibit D concerned events of December 26, or the day after the assault on Ms. Cardinale. December 26 is also the day that defendant Det. Robinson had his limited involvement in this case, *i.e.*, preparing and submitting the warrant application (Exhibit F to ECF 45-2) to the superior court. Defendants' Exhibit D has pages of narrative entries by unknown persons, many of which defendants highlighted as supposedly being significant to their summary judgment opposition.


3. Because I did not recognize defendants' Exhibit D, I went through my file on defendants' discovery responses and verified that according to my records defendants had never previously identified or produced their Exhibit D. This included not producing it in response to Plaintiffs' first set of Rule 34 production requests which specifically called for production of any and all CAD reports. These Rule 34 requests were propounded June 16, 2021 and defendants served their response (pursuant to an agreed-upon extension) August 24, 2021.

4. Upon verifying that my records showed that defendants had not previously identified or produced their Exhibit D, I emailed defense counsel so informing him. See **Exhibit A**, true copy of my email. Yesterday, July 5, I received defense counsel's email response. In it, defense counsel acknowledged his clients had not produced their Exhibit D in discovery as they should have. See **Exhibit B**, true copy of defense counsel's email.

5. Had defendants produced their Exhibit D when they should have, meaning not later than August 24, 2021 (instead of June 30, 2023, or well after the discovery cut-off) I would have conducted discovery using defendants' Exhibit D. That discovery would have included identifying the sources of information reflected in Exhibit D's narrative

1 entries, their reliability and so on. This was particularly important for the deposition of  
2 defendant Det. Robinson, whom I deposed June 27, 2022. Det. Robinson prepared the  
3 warrant application (Exhibit F to ECF 45-2) and testified that in addition to what deputies  
4 told him, Det. Robinson relied on the Sheriff's department CAD entries.

5 I declare under penalty of perjury that the foregoing is true and correct. Executed  
6 July 6, 2023, at Los Angeles, California.

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8 \_\_\_\_\_  
Donald W. Cook